Nos. 15-233 and 15-255

Supreme Court, U.S.
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Supreme Court of the United States

MELBA ACOSTA-FEBO, AS GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO AGENT, AND JOHN DOE, IN HIS OFFICIAL CAPACITY AS EMPLOYEE OR AGENT OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO,

Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, BLUEMOUNTAIN CAPITAL MANAGEMENT, LLC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement contained in the Petition for a Writ of Certiorari remains accurate.

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INTRODUCTION

Respondents would have the Court believe that Congress intended to prevent Puerto Rico from enacting legislation to address its fiscal crisis. That position can be sustained only if Congress made "clear and manifest" its intention to preempt several of the most fundamental aspects of Puerto Rico's police powers—the power to manage its public corporations and to protect its citizens from economic calamity. But Congress did not do so. Instead, it embedded § 903(1) within chapter 9 and then withdrew access to chapter 9 from Puerto Rico's municipalities. Far from signaling preemption, that statutory design fits the approach Congress has always taken in bankruptcy matters: When entities like Puerto Rico's municipalities are excluded from federal law, they may be governed by their States' bankruptcy statutes.

Rather than confront the central question—Did Congress clearly state that it wanted to bar Puerto Rico's municipalities from access to any form of bankruptcy relief?—Respondents devote much of their briefs to describing a parade of horribles that supposedly would follow from a ruling against them. If Puerto Rico has the power to pass the Recovery Act, they argue incessantly, then every State could voluntarily withdraw from chapter 9 and do the same. That would undermine the principle of "uniformity" that they claim is the federal government's central goal.

Those arguments are doubly flawed. A State whose municipalities are subject to chapter 9, but tries to slough off the federal regime in favor of its own, is in a fundamentally different position from one that is not

given the opportunity to employ federal law at all. The Bankruptcy Code's treatment of banks and insurance companies—which are exempt from federal relief but permitted to seek state relief—proves that point. Nor is it clear how leaving Puerto Rico's public corporations to fend off an unruly race to the courthouse promotes uniformity more than allowing the Commonwealth to deploy its own statute to create an orderly process.

Respondents' arguments for disregarding the statutory definitions of "creditor" and "debtor," and their revisionist history of § 903(1), fail too. Congress insisted that definitions in the Bankruptcy Code be applied. And the history supplies no reason to suppose that Congress departed from its traditional treatment of entities exempt from federal law.

At bottom, the text, structure, and history of § 903(1) all demonstrate that Congress did not intend to preempt the Recovery Act. At the very least, they show that Respondents' reading is neither "clear" nor "manifest," and therefore insufficiently supported to keep Puerto Rico from fulfilling its obligation to its citizens.

ARGUMENT

I. SECTION 903(1) DOES NOT PREEMPT THE RECOVERY ACT.

A. The Text, Structure, And History Of § 903(1) Show That It Does Not Apply To Puerto Rico.

In its opening brief, GDB demonstrated that § 903(1) cannot apply to laws enacted by Puerto Rico because chapter 9 as a whole, and § 903 in particular, do not apply to the Commonwealth or its municipalities. GDB Br. 28-31. GDB further showed that § 903(1) is inextricably linked to § 903's preamble. *Id.* at 27-28. Because the preamble does not apply to Puerto Rico's municipalities, neither can § 903(1). *Id.*

Respondents do not dispute that § 903(1) is linked to § 903's preamble. Rather, they contend that even though § 903(1) is a "proviso" to the preamble, it states an independent rule of law. BlueMountain Br. 29-31; Franklin Br. 20-21. But the issue is not what label to give § 903(1). Congress fused the § 903 preamble with § 903(1) by using the term "*such municipality*" in both. That phrase means that the municipalities referred to in § 903(1) are the same ones that might be "limit[ed] or impair[ed]" by a chapter 9 proceeding, according to the preamble. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("such" means "[t]hat or those; having just been mentioned"). When the 1984 amendment excluded Puerto Rico's municipalities from chapter 9, those municipalities became no longer subject to the preamble. By extension, they became no longer subject to § 903(1).

BlueMountain does not even address the "such municipality" limitation. Franklin dismisses the point in a confusing footnote that appears to conflate the "such municipality" issue with the question of whether "creditor" and "debtor" must be given their statutory meanings. Franklin Br. 43-44 n.14. At bottom, Respondents offer no rebuttal to the clear textual linkage between the preamble and § 903(1).

In all events, Respondents are wrong about provisos, too. The general canon of construction is that the "grammatical and logical scope [of a proviso] is confined to the subject-matter of the principal clause." *United States v. Morrow*, 266 U.S. 531, 534–35 (1925). True, if "a statute's text and purpose indicate that Congress intended a proviso to have independent force, it will be so construed." Franklin Br. 20. But there is no such indication here. The two halves of § 903 deal with the same subject—the nature and limits of State power over municipalities—and they are connected by the word "but" and a dash. These are the classic indicia of a rule-and-exception structure. *See Morrow*, 266 U.S. at 534 (holding that the "general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality"). Congress plainly intended § 903(1) to operate on the same municipalities that are covered by the preamble in § 903.[1]

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1. The provisos cited by Respondents as stating independent rules are inapposite. In *Republic of Iraq v. Beaty*, the proviso at issue made no reference back to the original provision (whereas surrounding provisos did). 556 U.S. 848, 858-59 (2009); *see also United States v. Whitridge*, 197 U.S. 135, 141-43 (no words linking proviso to preamble). Here, by contrast, § 903(1) explicitly references the preamble by the phrase "such municipality." In *Georgia R.R. & Banking Co. v. Smith*, the Court held that the

B. Respondents Are Wrong That If The Recovery Act Is Upheld, Every State Could Pass A Municipal-Bankruptcy Statute Conflicting With Chapter 9.

Respondents' primary objection to construing § 903(1) not to preempt the Recovery Act is that it would supposedly open the floodgates to every State passing its own municipal-bankruptcy statute. In an argument repeated throughout their briefs, Respondents contend that if Puerto Rico can enact a municipal-bankruptcy statute simply because chapter 9 is unavailable to its municipalities, then the fifty States can do the same by withholding chapter 9 authorization from their municipalities, thereby rendering them ineligible for federal relief. BlueMountain Br. 3, 16, 24, 27, 32-33; Franklin Br. 4, 19-20. That argument glosses over the crucial distinction between municipalities merely *ineligible* to file under chapter 9 and those *categorically excluded* from the chapter.

Municipalities in the fifty States may file for chapter 9 relief provided that they meet certain *eligibility requirements* specified in the Code, one of which is receiving State authorization. 11 U.S.C. § 109(c)(2). If a municipality fails to satisfy the conditions in § 109(c), however, it may not turn to a conflicting state bankruptcy law, under principles established long ago in *International Shoe Co. v. Pinkus*, 278 U.S. 261, 264-65 (1929). In *Pinkus*, an individual debtor was ineligible to file for a bankruptcy

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outcome of the case did not turn on whether the proviso stated an independent rule of law, and it therefore did not address the issue. 128 U.S. 174, 181-82 (1888).

discharge under federal law because he had received a discharge within the past six years. *Id.* at 264-66. Despite that ineligibility, the Court held that he was not permitted to invoke a state insolvency law because he was still *covered* by the federal bankruptcy regime. *Id.* According to the Court, "Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, *choice* between the relief provided by the Bankruptcy Act and that specified in state insolvency laws." *Id.* at 265 (emphasis added). By the same logic, a State cannot voluntarily opt out of chapter 9 in favor of a conflicting bankruptcy regime that it fashions for its own municipalities.

The *categorical exclusion* of Puerto Rico's municipalities is an entirely different situation, and it has two important consequences. First, because Congress removed the federal bankruptcy regime from Puerto Rico's municipalities, the regime created by Puerto Rico cannot conflict with a (non-applicable) federal law. Second, the Commonwealth's municipalities do not merely fail to satisfy an eligibility condition. They are disqualified from federal bankruptcy protection under any circumstances. There is no element of State "choice" involved.

Under § 101(52), Puerto Rico is not considered a "State" for the purpose of defining "who may be a debtor under chapter 9." It is a wholesale exclusion from the universe of municipalities covered by the federal bankruptcy statute. The structure of § 109 supports this reading. While § 109(c) lists detailed conditions for chapter 9 eligibility, § 109(a) first establishes a broader "category of eligible entities" who may obtain relief (*i.e.*, "who may be a debtor") under Title 11 generally. 2 Collier

on Bankruptcy ¶ 109.01(1). One type of entity listed in § 109(a) is a "municipality," defined elsewhere as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40). And "State" excludes Puerto Rico for purposes of defining which municipalities may be chapter 9 debtors. *Id.* § 101(52). Thus, § 101(52) has the effect of excluding Puerto Rico's municipalities from the definition of municipalities governed by chapter 9.

Accordingly, Puerto Rico's municipalities are in precisely the same boat as banks and insurance companies, which likewise can never invoke federal bankruptcy protection. 11 U.S.C. § 109(b)(2). Yet despite that exclusion, it is well-established that the States may enact their own avenues for addressing the insolvency of those entities. *See, e.g.*, *Neblett v. Carpenter*, 305 U.S. 297, 305 (1938) (upholding reorganization of insurance company under State law); *Doty v. Love*, 295 U.S. 64, 70-74 (1935) (upholding reorganization of bank under State law); *see also U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 519 (1993) (Kennedy, J., dissenting) (Ohio's prerogative to enact law governing liquidation of insurance companies "emanate[s] . . . from the longstanding decision of Congress to exempt insurance companies from the federal bankruptcy code"). Indeed, most, if not all, States have enacted their own bankruptcy statutes for banks and insurance companies. *See, e.g.*, GDB Br. 21 & n.11. When Congress disqualified Puerto's municipalities from chapter 9, they acquired the same status as those entities.[2]

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2. In this regard, Respondents mischaracterize GDB's position when they assert that the Recovery Act can be upheld only if the 1984 amendment to the definition of "State" amended the meaning of § 903(1). Franklin Br. 13-17; BlueMountain Br. 25-29. Quite to the contrary, the meaning of § 903(1) has not changed: It

C. There Is No Basis To Disregard The Statutory Definitions Of "Creditor" And "Debtor."

In its opening brief, GDB demonstrated that the Recovery Act must be upheld when the statutory definitions of "creditor" and "debtor" are followed because § 903(1) applies only to a creditor of a debtor in a Title 11 case, and Puerto Rico's municipalities cannot be such debtors. GDB Br. 31-33. Respondents, like the First Circuit, concede this point. Accordingly, they advocate disregarding those statutory definitions because they would supposedly lead to an "absurd" or "strained" interpretation of § 903(1). Franklin Br. 40; *see also* Pet. App. 25a n.18.

The Bankruptcy Code's definitions are not mere suggestions, however. In three places, including in chapter 9, Congress rendered its definitions mandatory. *See* 11 U.S.C. §§ 101, 103(f), 902(b). When § 903(1)'s first predecessor was enacted in 1946, Congress made chapter 9's definitions discretionary if "a different meaning is plainly required by the context." Act of July 1, 1946, Pub. L. No. 79-481, § 82, 60 Stat. 409; *see also* Act of July 1, 1898, Pub. L. No. 55-171, § 1, 30 Stat. 544 (1898) (explaining that statutory definition must be given effect "unless the same be inconsistent with the context"). When Congress overhauled chapter 9 in 1976, it eliminated that discretion. *See* Act of April 8, 1976, Pub. L. No. 94-260,

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has always codified the traditional rule of bankruptcy preemption. GDB Br. 36-41. Under that traditional rule, Puerto Rico (and the States) are preempted from passing their own municipal bankruptcy statutes conflicting with chapter 9 whenever chapter 9 is available to their municipalities. *Id.* However, once chapter 9 becomes unavailable (as it did for Puerto Rico's municipalities in 1984), § 903(1) no longer applies.

§ 81, 90 Stat. 315 (1976) ("As used in this chapter, the term . . . means . . . "). Today, the definitions are mandatory in chapter 9 and all other chapters of the Code.

Contrary to Franklin's suggestion, applying the statutory definitions of "creditor" and "debtor" neither guts § 903(1) nor leads to anomalous results. Franklin Br. 36-38. As bankruptcy and municipal finance professors David A. Skeel, Jr. and Clayton P. Gillette explain, when the definitions are applied, § 903(1) allows a municipality excluded from chapter 9 to enter into a state-law composition that does not impair contractual obligations and then later obtain further relief under federal law if chapter 9 is subsequently made available. Amicus Brief of Professors Clayton P. Gillette and David A. Skeel, Jr. 9-13.

Franklin dismisses this reading of § 903(1) by asserting that a "serial filer" for municipal bankruptcy will be a "rare" occurrence. Franklin Br. 37. But that was the precise situation in *Faitoute Iron & Steel Co. v. City of Asbury Park, N.J.*: Asbury Park began a composition under New Jersey law while there was no constitutional federal municipal-bankruptcy law, and then a new chapter 9 took effect during the course of the state-law proceedings. 316 U.S. 502, 507-08 (1942). The same situation could just as easily occur here. Congress has been requested to restore the Commonwealth's municipalities to chapter 9, but it has not acted for over a year. If the Recovery Act is upheld and Congress later makes Puerto Rico's municipalities eligible for chapter 9, the municipalities of Puerto Rico will find themselves in the same position as Asbury Park.

Respondents argue that when § 903(1)'s predecessor was first enacted, the definition of "creditor" was not tied to a pending Title 11 case, and Congress never intended to change that meaning. BlueMountain Br. 35-38; Franklin Br. 42-43. That is wrong. "Creditor" always meant the creditor of a debtor in chapter 9. Respondents are correct that Congress intended no substantive change. They are incorrect that the original definition of creditor included holders of claims against entities not in chapter 9. "Creditor" was originally defined as the holder of a "security," and at that time every use of "security" in then-chapter IX referred to a security of an entity that had filed a chapter IX case. *See* Act of July 1, 1946, Pub. L. No. 79-481, ch. 532, 60 Stat. 409, 409-16. When Congress enacted the current definition of "creditor" in 1978, it continued requiring that a "creditor" must be a creditor of a Title 11 debtor. 11 U.S.C. § 101(10)(A).

Franklin argues that the Code frequently uses the term "creditor" to mean something other than its statutory meaning—a creditor of a debtor in a Title 11 case whose claim arose "at the time of or before the order of relief."[3] Franklin Br. 39-42. Franklin contends that in many places, "creditor" refers to a claimholder prior to the commencement of a Title 11 case, where the "creditor" has no pending claim against a "debtor." It further contends that several provisions of the Code refer to creditors in a

3. As relevant here, the statutory definition of creditor has two elements: (i) an entity must hold "a claim against the debtor," and (ii) that claim must have arisen pre-petition ("at the time of or before the order for relief concerning the debtor"). 11 U.S.C. § 101(10)(A).

context where there is no "order for relief." Franklin is wrong in every instance.[4]

As an initial matter, Respondents fail to acknowledge that the provisions they contend require the "ordinary," as opposed to the statutory, definition of "creditor" are only triggered after commencement of a Title 11 case—at which time there will always be a "debtor" (§ 101(13)). That is a fundamental flaw in their argument.

Moreover, Franklin's argument that an "order for relief" exists only after the court determines that a municipality is eligible for chapter 9, Franklin Br. 39-40, ignores § 301(b), which provides that "the commencement of a voluntary case under [Title 11] constitutes an order for relief." In other words, § 301(b), made applicable to chapter 9 cases by § 901(a), provides that once a chapter 9 petition is filed, there is already an order for relief. Thus, at the time of the eligibility hearing, when the court looks to see if the criteria in § 109(c)(5)(A)-(D) are met, the statutory "creditors" referenced by Respondents in § 109(c)(5)(A)-(D) have already met the statutory definition of "creditor" as a case has already commenced. That the court may provide another appealable order for relief after the eligibility hearing is beside the point.

Similarly, Franklin's argument regarding the use of "creditor" in chapter 15 is unavailing. Franklin Br.

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4. Respondents no longer question the use of "creditor" in § 502(a), despite pressing it vigorously before the First Circuit. Section 502(a) was also the lead example cited by the First Circuit as supposedly showing that the statutory definition does not work. Apparently, Respondents tacitly recognize now that the statutory definition fits that use of "creditor" to a tee. *See* GDB Br. 33-34 n.14.

40-41. The flaw in its argument is the assertion that § 301(b) "defines" "order for relief," and because there is no "order for relief" in chapter 15, there can never be a "creditor" as defined in the statute. But "order for relief" is not a defined term in the Bankruptcy Code, and § 301(b) nowhere pretends to be a definitional section. It merely provides one example of an order for relief. In chapter 15, §§ 1519(a) and 1521(a) authorize a court to order "relief" upon the filing of the chapter 15 case and upon recognition of the foreign proceeding, respectively. Indeed, this is evident from the titles of those sections. As such, orders for relief occur upon commencement of a chapter 15 case, and the definition of "creditors" works just as well there.

D. The Statutory History Of § 903 Supports Petitioners' Argument.

Respondents deny that § 903(1) codified the traditional rule of bankruptcy preemption, which allows States to pass legislation for entities excluded from federal relief. According to BlueMountain, § 903(1) was intended to overturn the ruling in *Faitoute* and thereby prevent States from enacting municipal-bankruptcy legislation under any circumstances. BlueMountain Br. 20. As GDB showed in its opening brief, however, there is no reason to suppose that § 903(1) swept that broadly. GDB Br. 37-40. Respondents' fundamental error is to assume that when Congress enacted the predecessor of § 903(1)—at a time when chapter 9 was available to every municipality in the United States—it intended to bar States from enacting municipal-bankruptcy laws even if chapter 9 later became unavailable. *Id.*

As the parties agree, § 903(1) was designed to address the holding in *Faitoute*, which held that federal and state bankruptcy remedies, which did not conflict,

could coexist side by side because the federal power was "carefully circumscribed" to reserve "full freedom to the states." 316 U.S. at 508-09. Congress wanted all State municipalities to use chapter 9. But it does not follow that Congress went to the opposite extreme and intended that States *never* should have the power to pass municipal-bankruptcy legislation *even if* federal remedies were withdrawn. Indeed, the presumption is that Congress did not mean to change the long-standing practice without a clear indication that it was doing so, which is absent here. *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998); *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992).[5]

Trying a different tack, Franklin argues that Congress could not have intended to allow the States to pass their own municipal-bankruptcy statutes because "Congress did not believe—either when it enacted § 903(1)'s predecessors or later" that the States had that power, in light of the Contract Clause. Franklin Br. 32. That assertion is baffling. *Faitoute* held precisely that the States *could* exercise that power without violating the Contract Clause. 316 U.S. at 513-16. Section 903(1) would have been completely unnecessary if Congress believed that the States were constitutionally disabled from passing legislation on their own.

Franklin's focus on the Contracts Clause is a red herring. Franklin Br. 28-30. How the Clause applies

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5. Because chapter 9 had always been subject to sunset clauses, the first bill draft embodying § 903(1)'s predecessor provided that it would apply only while chapter 9 is in effect. *See* GDB Opening Br. 38-39. The Franklin respondents dismiss that legislative history because that draft bill was not enacted. Franklin Br. 23. But it is still significant that the time limitation was excised only when Congress deleted chapter 9's sunset provision.

to the Recovery Act is not before the Court. It was not decided by the courts below, and it is not fairly included within the question presented for review. In any event, Franklin's position that the Recovery Act violates the Contract Clause is wrong. The Recovery Act expressly provides that any composition under the Act must comport with the Contract Clause. Recovery Act § 128, Pet. App. 220a.[6] The Act's incorporation of that standard ensures that no composition may be approved where there exists a "less drastic" means for achieving the same governmental purpose. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S 1, 30 (1977).[7] Thus, all remedies currently available to creditors are also furnished by the Recovery Act, and it is only where those remedies fall short that the other tools provided by the Recovery Act may be accessed.[8]

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6. The central requirement of the Contract Clause is that state law may not cause a "substantial diminution" in the value of a contractual obligation. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983); *Faitoute*, 316 U.S. at 511, 514. The one exception is when the police power justifies a deviation. *See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444 (1934); *see also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977).

7. In a case under Chapter 3 of the Recovery Act, any plan must provide creditors with at least as much value as they would have received without application of the Recovery Act. Recovery Act § 315(d), Pet. App. 261a. Moreover, creditors are entitled to receive future revenue payments from the debtor corporation on top of the amount they would collect if they enforced their claims. *Id.* § 315(k), Pet. App. 262a-63a. None of these protections exists in chapter 9.

8. Having failed to demonstrate that the Recovery Act is expressly preempted by § 903(1), BlueMountain seeks refuge

II. THERE IS A STRONG PRESUMPTION THAT CONGRESS DID NOT INTEND TO PREEMPT THE RECOVERY ACT.

As shown above, the text, structure, and history of § 903 all point inexorably to the conclusion that the Recovery Act is not preempted. But to the extent that it is even a close question, the presumption against preemption controls. Respondents advance four main arguments that the presumption does not apply to the Recovery Act. BlueMountain Br. 45-54; Franklin Br. 44-53. None is meritorious.

First, Respondents miss the point when they contend that before the 1930s, there was no significant tradition of state municipal bankruptcy legislation. BlueMountain Br. at 47-48. As GDB explained in its opening brief, "municipal bankruptcy" is not the relevant field. GDB Br. 22-24. Moreover, in reality, there was no tradition of state *or* federal municipal bankruptcy legislation before roughly the 1930s.[9] States addressed municipal fiscal distress in

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in the doctrines of field preemption and conflict preemption. BlueMountain Br. 54-59. For the reasons provided by the Commonwealth, those doctrines have no application here. *See* Commonwealth Reply Br. 21-23.

9. This is not surprising. The history of bankruptcy legislation shows a steady expansion of the persons and entities covered, beginning with protection for traders alone. *See Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 184-185 (1902). Once numerous municipalities across the country fell into insolvency during the Depression, at least one State responded by expanding its bankruptcy laws to cover municipalities—which this Court recognized that it had the power to do. *See Faitoute*, 316 U.S. at 509.

many other ways, through "refunding legislation, statutes controlling compromises, voluntary and involuntary court receiverships," and other mechanisms, such as revocation of municipal charters. A.M. Hillhouse, Municipal Bonds: A Century of Experiences 321 (1936). The one constant throughout this time was the States' preeminent concern with "the fiscal management of [their] own household[s]." *Faitoute*, 316 U.S. at 509. As this Court has recognized for more than a century, cities and other municipal entities are creatures of state law. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

Given the special responsibility that States bear for their municipalities, it is implausible that Congress was unconcerned about treading broadly on a State's ability to control its municipalities. The statute itself evidences Congress's intent to preempt as little as possible. States are given the power to decide whether their municipalities may file under chapter 9 in the first place. 11 U.S.C. § 109(c)(2). Even when they do, the statute emphasizes that it is imposing no limitation or impairment on a State's power to control its municipality, including its expenditures. *Id.* § 903.

Second, while Respondents argue that there is a constitutional "imperative" to maintain uniformity, they do not explain how leaving the Commonwealth's municipalities to fend off chaotic races to the courthouse promotes greater uniformity than allowing an orderly debt-enforcement process under the Recovery Act. Respondents also misapply the meaning of the Bankruptcy Clause and its uniformity requirement. *See* U.S. Const. art. 1, § 8, cl. 4 (granting Congress "power to . . . establish . . . uniform laws on the subject of bankruptcies"). The

uniformity requirement is a *restriction* on Congress, not a State *obligation*; if Congress passes a bankruptcy law, it must have uniform application. *See Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982). There is no Constitutional "imperative" for *State* bankruptcy laws to be uniform, however. *Contra* BlueMountain Br. 46. Indeed, State bankruptcy laws governing banks and insurance companies differ throughout the country, yet this Court has repeatedly upheld those "dis-uniform" State laws. *See, e.g., Neblett*, 305 U.S. at 305; *Doty*, 295 U.S. at 70-74; *see also Faitoute*, 316 U.S. at 509.

Moreover, it is difficult to understand how the interest in bankruptcy laws could be described as "uniquely federal." BlueMountain Br. 46 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). As shown in GDB's opening brief, at least until 1898, it is the States, not the federal government, that played the dominant role in bankruptcy legislation. GDB Br. 21-22.

Third, Respondents argue, oddly, that Congress's occupation of the field of municipal bankruptcy in the second half of the twentieth century somehow negates the existence of the presumption. BlueMountain Br. 47. That argument is wrongheaded. The operative question concerns the Congressional intent embodied in the current statute, which follows the intention of the 1946 Congress when it originally passed § 903(1). In any event, the only reason that there have not been more State municipal bankruptcy statutes since then is that Congress made chapter 9 available, along with an entire bankruptcy court system to implement it. That does not change the fact that States continue to share an acute concern for the fiscal plight of their municipalities.

Finally, BlueMountain misstates the law when it argues that the presumption against preemption plays no role when there is an express preemption clause. BlueMountain Br. 52-53. This Court has repeatedly and squarely held that the presumption *does* apply to express preemption provisions. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188-89 (2014); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).[10]

On account of the presumption against preemption, the Recovery Act should be held preempted only if that was the clear and manifest intent of Congress. *Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355, 365 (2002). While Respondents insist that Congress made that intent "unmistakably clear," BlueMountain Br. 18; *see also* Franklin Br. 7, that is a wild and unfounded exaggeration. Nothing in the text, purpose, or history of § 903(1) "unmistakably" signals that Congress wanted to bar state municipal-bankruptcy remedies when chapter 9 is not available. *See* GDB Br. 26-44. And to the extent that there is any uncertainty concerning the proper construction of

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10. The two cases cited by BlueMountain in which the presumption against preemption was not applied are readily distinguished. In *United States v. Locke*, Washington State tried to regulate in the area of interstate maritime commerce, which is an archetypal field of federal, not State, interest. 529 U.S. 89, 108 (2000). In *Buckman*, a user of a medical device attempted to bring a State-law claim based on the defendant lying to the Food and Drug Administration. 531 U.S. at 346-47. The Court did not apply the presumption because "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied." *Id.* at 347 (quotation marks omitted). The Recovery Act is easily distinguishable from those situations because the Act regulates municipalities and the Commonwealth's own fiscal condition, two areas of traditional State concern.

§ 903(1), the presumption requires the Court to "accept the reading that disfavors pre-emption." *Waldburger*, 134 S. Ct. at 2188-89; *Altria*, 555 U.S. at 77.

III. RESPONDENTS DOWNPLAY THE SERIOUSNESS OF THE SITUATION IN PUERTO RICO.

Having failed to prove their position on the text of the statute, Franklin resorts to arguing that Puerto Rico can resolve its debt crisis even without the Recovery Act. Those arguments are misguided and, in any event, irrelevant to the preemption question under review. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011).

Franklin contends that a receiver can solve all the Commonwealth's problems. Franklin Br. 46-47, 59. That is not correct. A receiver has no more power than the municipality itself. *See* P.R. Laws Ann. tit. 22, § 207(b). It could not raise money needed for capital expenditures; raise rates; bind holdouts; effect an automatic stay of litigation; preclude fuel suppliers from terminating supply contracts on the basis of *ipso facto* clauses; or take any other actions necessary to keep Puerto Rico's public corporations solvent and operational. Unlike PREPA, many of Puerto Rico's other public corporations, such as its sewer authority ("PRASA") and its highway authority ("PRHTA"), must pay creditors before operating expenses. Without the ability to restructure, those public corporations would soon find themselves with insufficient funds for operations after paying their creditors—regardless of whether they have a receiver.

Nor is Franklin correct that the Commonwealth's public corporations can simply negotiate their way out of the crisis without the ability to bind holdouts. Franklin trumpets a recent deal between PREPA and some of its creditors as proving that negotiations afford sufficient relief. Franklin Br. 47. That agreement is highly contingent; it covers only a fraction of PREPA's debt and imposes conditions that may never be satisfied. *See, e.g.*, BlueMountain Br. 15 (acknowledging the deal's contingent nature). PREPA's inability to compel holdout creditors to join the agreement underscores the necessity of a law like the Recovery Act. The absence of an ability to bind holdout creditors has been identified, even by the creditors, as the Achilles' heel of any nonbinding restructuring initiative.[11]

Many of Puerto Rico's other public corporations and instrumentalities—and indeed the Commonwealth itself—face equally unsustainable debt burdens.[12] None of them has even a highly contingent deal in place with creditors.[13]

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11. *See* Nuveen Asset Management, Puerto Rico's Course Forward (Feb. 2006), *available at* http://www.nuveen.com/Home/Documents/Default.aspx?fileId=68191.

12. *See generally* Working Group for the Fiscal and Economic Recovery of Puerto Rico, Puerto Rico Fiscal and Economic Growth Plan: Update Presentation (Jan. 18, 2016), *available at* http://www.bgfpr.com/documents/PRFEGPUpdatePresentation1.18.16-2.pdf.

13. Other public corporations have defaulted, or are well on their way. For example, the Metropolitan Bus Authority is currently in default on a credit facility and is operating on a reduced schedule. PRASA has suspended debt service set asides and, as a result, has announced that it will likely not be able to meet July payments of approximately $31 million. PRHTA and the Puerto Rico Convention Center District Authority are depleting their reserves and not too far down the road will also be unable to pay their debts as they become due.

There is no reason to believe that a similar deal can or will be consummated for any of these other entities, let alone for *all* of them. The fact that Respondents can now point to only one possible, highly contingent deal for a single issuer is evidence that negotiated agreements are an exception, not a solution. If, as Respondents insist, the Bankruptcy Code preempts all Commonwealth restructuring laws, the result will not be negotiated agreements resolving all relevant debts, but disorderly default across the entire governmental structure of the Commonwealth.[14]

Franklin is also incorrect that there will be no race to the courthouse. Franklin Br. 58. Creditors have *already* begun bringing lawsuits following recent defaults. *See* Aaron Kuriloff, *Insurers Sue Puerto Rico*, Wall St. J., Jan. 9, 2016, at B2. Not all the public corporations have sovereign immunity. *See Redondo Constr. Corp. v. P.R. Highway & Transp. Auth.*, 357 F.3d 124, 128-29 (1st Cir. 2004) (Highway Authority is not immune from suit); *Riefkohl v. Alvarado*, 749 F. Supp. 374, 375 (D.P.R. 1990) (same for PREPA). And contrary to Franklin's assertion, Franklin Br. 58-59, some creditors have been authorized to attach assets. *See Redondo Constr. Corp. v. P.R. Highway & Transp. Auth.*, No. 09-cv-2299 (D.P.R. Feb. 13, 2012) (ECF Nos. 45, 47, 52) (ordering PRHTA bank accounts frozen and issuing writs of execution allowing plaintiffs' withdrawal of funds in satisfaction of judgment).

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14. Indeed, creditors have demonstrated that they are prepared to use preemption not only to challenge the ability of Puerto Rico's public corporations to restructure under the Recovery Act, but also to challenge any actions they believe are not in their own self-interest, including the ability of the Commonwealth itself to honor its Constitutional obligation to pay its public debt. *See, e.g., FIGC v. Padilla, et al.*, Case No. 16-1095 (D.P.R. Jan. 19, 2016) (Complaint).

Respondents raise the idea of a moratorium statute while in the same breath argue that such a statute would be unconstitutional. Franklin Br. 46. n.15. A moratorium—while helpful—would be insufficient. The public corporations' $26 billion debt needs restructuring. Delaying the restructuring of the Commonwealth's and the public corporations' debt will just cause further deterioration and will be to the detriment of Puerto Rico and its creditors. A moratorium without debt reduction leaves the debtor among the walking wounded.

CONCLUSION

The decision of the First Circuit should be reversed.

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